IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-152

WILLIAM R. MING, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner tenders this petition for rehearing following an order on October 16, 1972, denying a petition for certiorari.

In accordance with Rule 58 of the Rules of this Court, petitioner asserts that there are intervening circumstances of substantial, and perhaps controlling, effect. Those circumstances are the statements of the Solicitor General in support of his petition for certiorari in *United States* v. *Bishop*, 71-1698, and the grant of a writ of certiorari by this Court in that case on October 10, 1972.

Petitioner in the instant case did not have access to the statements of the Solicitor General in the *Bishop* case until after the petition for certiorari had been denied in the instant case.

The major issue in the instant case, as petitioner endeavored to demonstrate in his petition for certiorari, is the meaning to be given the term "willfully" in §7203 of the Internal Revenue Code. Petitioner has contended that this statutory word of art, see *Screws* v. *United States*, 325 U.S. 91, 101-102, 65 S. Ct. 1031, 1035-1036 (1945) and cases there cited, should be given the same meaning whenever it is used in federal criminal legislation, and particularly should be given the same meaning when used in different sections of the Internal Revenue Code. In addition, petitioner contended that there was a conflict among the courts of appeal of the various circuits as to the meaning of the term "willfully" and urged this Court to resolve that conflict.

Perhaps inadvertently the Solicitor General misconstrued the argument of petitioner and, in effect, urged that petitioner failed to distinguish between the elements of the offenses prohibited in §§7201 and 7203 of the Internal Revenue Code (*Ming*, Brief in Opposition, pg. 5). Nothing in the record in this case nor in the briefs warrants that argument. §7201 provides that it is a felony if any person "willfully attempts in any manner to evade or defeat any tax, etc."[1] Thus in §7201 the proscribed conduct is the "at-

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[1] §7201. *Attempt to evade or defeat tax*

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

tempt in any manner to evade or defeat any tax." That section makes it clear that this is not a part of the definition of the term "willfully" as used in §7201. Rather, it is a definition of the crime itself.

When §§7201, 7203, 7206 and 7207 of the Internal Revenue Code are compared, it is thus apparent that the term "willfully" has been used by Congress in each of them without any definition of the term. Significantly, it is used four times in §7203.

The Solicitor General in *United States* v. *Bishop* now argues that the term "willfully" in §§7206 and 7207 should be given the same meaning, i.e., that the Ninth Circuit was wrong in concluding that there could be a "lesser included offense" in that case. Thus the Solicitor General in *Bishop* takes precisely the position which petitioner took in the instant case and which the Solicitor General resisted. Similarly, in the *Bishop* case the Solicitor General, in effect, concedes the existence of a conflict in the several circuits with respect to the meaning to be given to the term "willfully" in the Internal Revenue Code. Ironically, to show the conflict he cites the very cases relied upon by the petitioner and the *amici*.

In the instant case the Solicitor General urged that petitioner failed to show that the rule of the Ninth Circuit would have produced a different result in petitioner's case (*Ming*, Brief in Opposition, pg. 8). We respectfully submit that under the Rules of this Court that is of no moment. It is the existence of the conflict in the decisions which is the important thing and this now appears to be conceded in the *Bishop* case. It would appear to be a fair inference that this had some effect on the decision of this Court to grant the petition for certiorari in the *Bishop* case.

Petitioner recognizes that he may not properly, in a petition for rehearing, reargue the application for certiorari. In light of the foregoing matters, however, petitioner respectfully directs the attention of the Court again to the petition for certiorari in the instant case. This, particularly because the Solicitor General in the instant case urged that the petition for certiorari could be acted upon without waiting for disposition of *United States* v. *Bishop* when he knew, or ought to have known, that there was this similarity and inconsistency in his legal positions with respect to the instant case and the *Bishop* case (*Ming,* Brief in Opposition, pg. 8).

Petitioner would remind the Court that the Solicitor General and the court below in the instant case relied on the fact that the District Court instructed the jury that the term "willfully" in §7203 did not mean "accidental, inadvertent, or negligent." This negative interpretation does not justify a failure to require a showing beyond a reasonable doubt of criminal intent on the part of petitioner. This is particularly significant where, as here, what is involved is a failure to provide a construction of "willfully" sufficiently rigorous to assure that there may not be a conviction for violation of §7203 simply because there is a dispute between the government tax authorities and the defendant as to the propriety of the priorities on which his conduct was based, rather than the question as to whether his conduct was criminally motivated.

We respectfully submit that failure to give a uniform meaning to the term "willfully" permits, and indeed encourages, differences in the criminal intent required to be shown in a tax case from case to case. This kind of law enforcement would not appear to satisfy traditional con-

stitutional requirements of due process and equal protection of the laws.

For all of the foregoing reasons we respectfully urge the Court to reconsider and rehear the petition for certiorari and to grant the petition.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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